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WHAT THE CIVIL RIGHTS MOVEMENT WAS AND WASN'T (WITH NOTES ON MARTIN LUTHER KING, JR. AND MALCOLM X)[†]

Cass R. Sunstein*

In this David C. Baum Memorial Lecture on Civil Liberties and Civil Rights, Professor Sunstein begins by noting that participants in the civil rights movement were often backward looking and even conservative, invoking commitments from the nation's past and arguing against reliance on the judiciary and the Supreme Court. They stressed above all two time-honored liberal principles: freedom from desperate conditions and opposition to caste. It is wrong to say (as many now do) that the movement was founded on a principle of race neutrality, and also wrong to say (as some now do) that the movement was opposed to "categories" or "binary oppositions." Professor Sunstein then raises important issues of character by exploring the works of Martin Luther King, Jr., and Malcolm X. He concludes by discussing the risks of dehumanization and brutality in movements committed to significant social change.

We're all black to the white man, but we're a thousand and one different colors. Turn around, look at each other!

—Malcolm X¹

Less and less do we transform private troubles into public issues. There is no willingness to take risks, no setting of dangerous goals. The time has come for a reassertion of the personal.

—Tom Hayden, 1962²

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1. MALCOLM X. THE AUTOBIOGRAPHY OF MALCOLM X 201 (1964) [hereinafter AUTOBIOGRAPHY].

2. JAMES MILLER, DEMOCRACY IS IN THE STREETS 101 (1987).

On a theoretical level, you can say that we believed in wanting to make history and achieve civil rights. But there was something else. . . . The whole emotion of defining not only yourself, but also your life by risking your life, and testing whether you're willing to die for your beliefs, was *the* powerful motive, I believe.

—Tom Hayden, 1987³

I have a dream that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification, that one day, right there in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.

—Martin Luther King, Jr.⁴

What claims were made by those involved in the civil rights movement of the 1960s? What sorts of changes were sought for society and particularly for law? And what are the implications of the civil rights movement for the issues that face us today? In this essay, I will explore a few aspects of this very large and controversial topic.

This is a somewhat unusual subject for a lawyer; but the topic is far from irrelevant to law. Some people think that the American constitutional tradition has been punctuated by a range of constitutional moments.⁵ Whether or not this is so, the civil rights movement of the 1960s unquestionably helped transform our understandings of constitutional principles, including most prominently rights to free speech and equal protection of the laws. The political and moral claims of the movement helped spur legislation⁶ that continues to raise foundational issues about our constitutional order.⁷

Few people think that the civil rights movement actually amended the constitution,⁸ and very possibly the best view is that social movements of this kind have no bearing on constitutional meaning. But if we are simply describing our practices, it seems clear that disputes about the appropriate characterization—and evaluation—of the movement play a continuing role in public debate and even constitutional law. It is therefore plausible to say that a discussion of the civil rights movement is not only of interest in its own right. It also connects to our understanding of our constitutional heritage.

3. *Id.* at 59.

4. MARTIN LUTHER KING, A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 219 (James M. Washington ed., 1986) [hereinafter TESTAMENT OF HOPE].

5. See 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

6. I refer especially to the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243, and to the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1988)). See GERALD ROSENBERG, THE HOLLOW HOPE (1991).

7. See, e.g., RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); LANI GUINIER, THE TYRANNY OF THE MAJORITY (1994).

8. Though Ackerman does make a suggestion of this sort. ACKERMAN, *supra* note 5, at 196.

There are of course great hazards in describing so large and diverse a movement, with so many different defining strands, in a short compass. What I will say is shamelessly selective and impressionistic. As my principal texts, I use the writings of Martin Luther King, Jr., the writings of Malcolm X, and the founding document of the Students for a Democratic Society (SDS), the Port Huron Statement.⁹ My goal is mostly descriptive, though not surprisingly my own evaluations will appear from time to time.

I. WHAT THE CIVIL RIGHTS MOVEMENT WAS FOR

A. *Deviation Between Practice and Ideal*

Perhaps surprisingly, a careful reading of the basic documents of the civil rights movement shows that much of the movement was conservative and backward looking. At least in its earliest stages, and to a significant extent thereafter, its defining aspirations came from America's own stated ideals. Often participants in the movement attempted to identify those ideals and to insist that the nation should live up to them. In this way the movement had an important Burkean caste, looking to the past to help define the appropriate content of the future.

For the most part, participants in the movement made little effort to find basic commitments in places external to the American culture, or to challenge the American culture itself. They described racial inequality as an anomalous institution entirely inconsistent with the basic thrust of American ideals and practices. (This came to be one of the most visible divisions between Martin Luther King, Jr., and Malcolm X, with the latter repudiating American ideals as fundamentally infected with racism.¹⁰) In this way, the civil rights movement borrowed a conventional lawyer's strategy: to invoke a widely shared and time-honored ideal and to show that the practice at issue did not comport with that ideal.

For example, the Port Huron Statement insisted that "[t]he declaration 'all men are created equal . . .' rang hollow before the facts of Negro life in the South and the big cities of the North."¹¹ The student authors emphasized "the hypocrisy of American ideals."¹² Martin Luther King, Jr., challenged the same thing in similar words, saying "All we say to America is—Be true to what you said on paper."¹³

9. See MILLER, *supra* note 2, app. Miller's book is an illuminating discussion of the SDS.

10. See AUTOBIOGRAPHY, *supra* note 1, at 273-81.

11. MILLER, *supra* note 1, at 330.

12. *Id.*

13. *Id.* at 282.

King's speeches frequently looked backward for the nation's core commitments. Thus he wrote in the "I have a dream" speech that his "is a dream deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal."¹⁴ Thus he suggested that "[o]ne day the South will know that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream."¹⁵ Thus King self-consciously invoked the Declaration of Independence, emphasizing that "[n]ever has a sociopolitical document proclaimed more profoundly and eloquently the sacredness of human personality."¹⁶

I have given simply a few illustrations of a pervasive claim in the civil rights movement. As I have suggested, the basic objection—that racial inequality was inconsistent with American ideals—was a defining feature of the movement. As the movement became more radical, some of its members urged that racial inequality was an ineradicable part of American practice, rather than an isolated anomaly. Black nationalism was a response to this claim.¹⁷

B. Freedom from Desperate Conditions

Participants in the civil rights movement stressed two substantive strands of liberal thought. Both of these are important aspects of liberalism. The first involves *freedom from desperate conditions*; the second involves *opposition to caste*.

American political thought has never been egalitarian. It has rejected equality of income and wealth as both unnecessary and counterproductive.¹⁸ But the belief in freedom from desperate conditions—not an egalitarian ideal—has long roots in the American political tradition. This form of freedom was supported by both James Madison¹⁹ and Thomas Jefferson.²⁰ It received one of its most celebrated endorsements in the 1944 State of the Union address by President Franklin Roosevelt. Roosevelt urged a "second Bill of Rights," including "the right to earn enough to provide adequate food and clothing and recreation," "the right of every family to a decent home," "the right to adequate medical care and the opportunity to

14. TESTAMENT OF HOPE, *supra* note 4, at 219.

15. THE WISDOM OF MARTIN LUTHER KING, JR. 11 (Alex Ayres ed., 1993).

16. TESTAMENT OF HOPE, *supra* note 4, at 119.

17. See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

18. See THE FEDERALIST NO. 10 (James Madison).

19. JAMES MADISON, 14 THE PAPERS OF JAMES MADISON 197-98 (Robert A. Rutland et al., eds., 1983).

20. THOMAS JEFFERSON, 8 THE PAPERS OF THOMAS JEFFERSON 681-83 (Julian P. Boyd ed., 1953).

achieve and enjoy good health," and "the right to a good education."²¹

In these circumstances, it cannot be said that the commitment to freedom from desperate conditions was a creation of the civil rights movement or of the 1960s. But ideas of this sort did reemerge, and in dramatic fashion. Such ideas were spurred by Michael Harrington's extremely influential book, *The Other America*.²² Answering John Kenneth Galbraith's *The Affluent Society*,²³ Harrington contended that in fact many Americans lived in desperate conditions. Though this "other America" was often invisible, it included, according to Harrington, millions of poor people. The book helped contribute to the "war on poverty" inaugurated by President Johnson.

An emphasis on desperate conditions was a crucial part of the civil rights movement, and it helped define its basic goals. Thus the Port Huron Statement suggested, "A program against *poverty* must be just as sweeping as the nature of the problem itself. It must not be just palliative, but directed to the abolition of the structural circumstances of poverty. . . . [E]xisting institutions should be expanded so the welfare state cares for *everyone's* welfare according to need."²⁴ King wrote in the same vein that "[t]he time has come for us to civilize ourselves by the total, direct and immediate abolition of poverty."²⁵ A particular concern was joblessness, and hence King said, "Let us do one simple, direct thing—let us end unemployment totally and immediately."²⁶

More concretely, King proposed a bill of rights for the disadvantaged, including equal opportunity and a right to training. His statement of overall objectives included "[e]conomic security, decent sanitary housing, and quality education for every American."²⁷ King urged that "[a] Bill of Rights for the Disadvantaged could mark the rise of a new era, in which the full resources of the society would be used to attack the tenacious poverty which so paradoxically exists in the midst of plenty."²⁸

Most dramatically, King proposed toward the end of his life a "poor people's march," designed to dramatize the plight of the disadvantaged. He wrote,

21. Franklin Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), reprinted in 13 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 41 (Samuel I. Rosenman ed., 1950).

22. MICHAEL HARRINGTON, *THE OTHER AMERICA* (1962).

23. JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* (1960).

24. MILLER, *supra* note 2, at 365.

25. THE WISDOM OF MARTIN LUTHER KING, JR., *supra* note 15, at 181.

26. *Id.* at 224.

27. *Id.* at 180.

28. *Id.* at 22.

There are millions of poor people in this country who have very little, or even nothing, to lose. If they can be helped to take action together, they will do so with a freedom and a power that will be a new and unsettling force in our complacent national life. Beginning in the new year, we will be recruiting three thousand of the poorest citizens from ten different urban and rural areas to initiate and lead a sustained, massive, direct-action movement in Washington. . . . [W]e will move on to Washington, determined to stay there until the legislative and executive branches of the government take serious and adequate action on jobs and incomes. . . . The many people who will come and join this three thousand, from all groups in the country's life, will play a supportive role, deciding to be poor for a time along with the dispossessed who are asking for their right to jobs or income—jobs, income, the demolition of slums, and the rebuilding by the people who live there of new communities in their place; in fact, a new economic deal for the poor.²⁹

This endorsement of "a new economic deal" was the practical effort that followed the commitment to freedom from desperate conditions.

C. *Opposition to Caste*

An important feature of the civil rights movement might be described as an anticaste principle.³⁰ This principle finds its origins in the original constitutional rejection of the monarchical legacy³¹ and the explicit constitutional ban on titles of nobility.³² The principle was fueled by the Civil War Amendments and the New Deal. The objection to caste entails an effort to eliminate, in places large and small, the caste system rooted in race. We might say that we have a caste system when a highly visible but morally irrelevant characteristic is associated with second-class citizenship, in the form of systematic disparities in well-being along the most important dimensions of social welfare. Consider in this regard the Port Huron Statement, which begins its discussion of discrimination with the claim, "Our America is still white."³³ The authors supported this claim with reference to sharp disparities between blacks and whites with respect to literacy, salary, work, unemployment, housing, education, and voting.³⁴

29. TESTAMENT OF HOPE, *supra* note 4, at 651.

30. For related discussion, see CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 291-318 (1993); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994) [hereinafter Sunstein, *The Anticaste Principle*].

31. See GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 11-109 (1992).

32. U.S. CONST. art. I, § 10.

33. MILLER, *supra* note 2, at 352.

34. *Id.*

Second-class citizenship was a continuing theme in the writing and speeches of Malcolm X. Indeed, Malcolm X stressed this idea in urging self-help remedies, which he thought necessary to overcome dependent status:

The American black man should be focussing his every effort toward building his *own* businesses, and decent homes for himself. As other ethnic groups have done, let the black people, wherever possible, however possible, patronize their own kind, hire their own kind, and start in those ways to build up the black race's ability to do for itself. That's the only way the American black man is ever going to get respect. One thing the white man never can give the black man is self-respect!³⁵

In fact, an important feature of any caste system involves corrosive effects on the self-respect of its victims; and self-respect was a key issue in the civil rights movement of the 1960s. The interest in racial integration—central, of course, to King—had a great deal to do with such effects. For King, racial segregation was unacceptable because it was a daily reminder of a perceived inferiority. “Any law that degrades human personality is unjust. All segregation laws are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority.”³⁶ Part of the problem with segregation was that it denied self-respect: “Segregation scars the soul of both the segregator and the segregated. The segregator looks upon the segregated as a thing to be used, not a person to be respected.”³⁷

Ironically, interest in black nationalism stemmed from similar concerns, with a perception that improved caste status could not be achieved in America.³⁸ Malcolm X favored racial separation on these grounds:

[A]s long as our people here in America are dependent upon the white man, we will always be begging him for jobs, food, clothing, and housing. . . . The Negro here in America has been treated like a child. A child stays with the mother until the time of birth! When the time of birth arrives, the child must be separated, or it will *destroy* its mother and itself The child cries for and needs its own world!³⁹

Much of Malcolm X's attack on the movement for integration consisted of a claim that blacks did not need to be with whites in order to succeed. Malcolm X thus wrote:

35. AUTOBIOGRAPHY, *supra* note 1, at 275.

36. THE WISDOM OF MARTIN LUTHER KING, JR., *supra* note 15, at 198.

37. *Id.*

38. See Peller, *supra* note 17, at 770-80.

39. AUTOBIOGRAPHY, *supra* note 1, at 246.

Respect as *human beings*! That's what America's black masses want. That's the true problem. The black masses want not to be shrunk from as though they are plague-ridden. They want not to be walled up in slums, in the ghettos, like animals. They want to live in an open, free society where they can walk with their heads up, like men and women!⁴⁰

On this count at least, King spoke similarly: "The Negro must boldly throw off the manacles of self-abnegation and say to himself and the world: 'I am somebody. I am a person. I am a man with dignity and honor. I have a rich and noble history, however painful and exploited that history has been.'"⁴¹

D. Emphasis on Citizenship and Nonjudicial Means for Seeking Change

The 1960s were a time of extraordinary judge-led developments, with the Warren Court at its ascendancy. But it should be recalled that the civil rights movement was hardly focussed on courts, and in fact the notion of "participatory democracy" enjoyed a large-scale revival in the 1960s.⁴² The revival has had continuing effects on American law. The Port Huron Statement is characterized above all by this theme: "[W]e seek the establishment of a democracy of individual participation, governed by two central aims: that the individual share in those social decisions determining the quality and direction of his life; that society be organized to encourage independence in men and provide the media for common participation."⁴³ Thus the student authors lamented that "almost no students value activity as citizens."⁴⁴ They urged that "politics has the function of bringing people out of isolation and into community."⁴⁵ They sought a political life based on the principle "that decision-making of basic social consequence be carried on by public groupings" and "that politics be seen positively, as the art of collectively creating an acceptable pattern of social relations."⁴⁶

Ideas of this sort played a substantial role in the civil rights movement. In its early stages the movement had been highly court-centered, above all in Thurgood Marshall's attack on segregation under the name of the Constitution.⁴⁷ But the Port Huron Statement

40. *Id.* at 272.

41. THE WISDOM OF MARTIN LUTHER KING, JR., *supra* note 15, at 199-200.

42. MILLER, *supra* note 2, is a detailed discussion.

43. *Id.* at 333.

44. *Id.* at 334.

45. *Id.* at 333.

46. *Id.*

47. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-61 (1994).

urged a different direction, saying that "the historic Supreme Court decision of 1954, theoretically desegregating Southern schools, was more a proclamation than a harbinger of social change—and is reflected as such in the fraction of Southern school districts which have desegregated, with Federal officials doing little to spur the process."⁴⁸ Hence the student movement relied little on courts.

Rejecting the judge-focussed approach, Martin Luther King sharply criticized reliance on courts alone, suggesting that judicial forums bred passivity: "When legal contests were the sole form of activity, the ordinary Negro was involved as a passive spectator. His interests were stirred, but his energies were unemployed."⁴⁹ In a similar vein, King wrote on the inadequacy of decrees standing by themselves: "The law tends to declare rights—it does not deliver them. A catalyst is needed to breathe life experience into a judicial decision by the persistent exercise of the rights until they become usual and ordinary in human conduct."⁵⁰

King also placed a premium on citizenship. To be sure, he was not a participatory democrat of the SDS variety; he saw participation as instrumental to other social goals. But he nonetheless urged widespread involvement in politics:

I do have a graduation thought to pass along to you. Whatever career you may choose for yourself—doctor, lawyer, teacher—let me propose an avocation to be pursued along with it. Become a dedicated fighter for civil rights. Make it a central part of your life. . . . You will make a greater person of yourself, a greater nation of your country, and a finer world to live in.⁵¹

Hence King emphasized the political process above all: "The chief weapon in our fight for civil rights is the vote. I can foresee the Negro vote becoming the decisive vote in national elections."⁵² One of King's most powerful early speeches is titled: "Give Us the Ballot—We Will Transform the South."⁵³ The speech is focussed on the need to supplement the judicial branch with democratic forums:

So far, only the judicial branch of the government has evinced this quality of leadership. If the executive and legislative branches of the government were as concerned about the protection of our citizenship rights as the federal courts have been, then the transition from a segregated to an integrated society would be infinitely smoother.⁵⁴

48. MILLER, *supra* note 2, at 353.

49. TESTAMENT OF HOPE, *supra* note 4, at 566.

50. *Id.* at 165.

51. *Id.* at 22.

52. THE WISDOM OF MARTIN LUTHER KING, JR., *supra* note 15, at 230.

53. TESTAMENT OF HOPE, *supra* note 4, at 197.

54. *Id.* at 198.

On this count, King and Malcolm X were closely allied. Malcolm X similarly expressed support for nonjudicial arenas:

The polls are one place where every black man could fight the black man's cause with dignity, and with the power and the tools that the white man understands and respects, and fears, and cooperates with. . . .

The cornerstones of this country's operation are economic and political strength and power. The black man doesn't have the economic strength—and it will take time for him to build it. But right now the American black man has the political strength and power to change his destiny overnight.⁵⁵

Similarly, Malcolm X said, "I might point out that I am 100 percent for any effort put forth by Black people in this country to have access to the ballot." He urged—in the now famous phrase—that people use "whatever means is necessary to secure those rights."⁵⁶

II. WHAT THE CIVIL RIGHTS MOVEMENT WAS NOT

In this section I deal briefly with two relatively recent "readings" of the civil rights movement. The first characterizes the movement as opposed to all racial classifications. On this view, a target of the civil rights movement, if its principles are rightly characterized, is affirmative action, and Martin Luther King is enlisted as an opponent of race-conscious approaches. The second "reading," popular in the academy in general if not in law schools, suggests that the movement should be taken as a challenge to "categorical thinking" or "binary oppositions." I suggest why both readings seem to me unfortunate.

A. Colorblindness

King's "I have a dream" speech referred to the possibility that "my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."⁵⁷ These words have been invoked in prominent attacks on affirmative action policies.⁵⁸ But participants in the civil rights movement were emphatically not committed to a norm of colorblindness. Though King sometimes spoke in these terms, he was speaking not abstractly but in a particular context at a particular historical moment, and he meant to make a particular historical point, one very

55. AUTOBIOGRAPHY, *supra* note 1, at 313-15.

56. MALCOLM X. FEBRUARY 1965: THE FINAL SPEECHES 24 (Steve Clark ed., 1992).

57. TESTAMENT OF HOPE, *supra* note 4, at 219.

58. See, e.g., William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 1000-05 (1984).

much connected to issues of lower caste status. He was certainly not speaking to the issue of affirmative action. In fact King was urging a form of social transformation of which affirmative action is, at least plausibly, a part.⁵⁹ The norm that he urged was not incompatible with affirmative action schemes and indeed could well have been used to support them.

In fact, King never spoke directly to the issue of affirmative action, although some of his statements suggested that he would hardly have rejected it on principle. Thus King wrote:

It is impossible to create a formula for the future which does not take into account that our society has been doing something special *against* the Negro for hundreds of years. How then can he be absorbed into the mainstream of American life if we do not do something special *for* him now, in order to balance the equation and equip him to compete on an equal basis?⁶⁰

I do not suggest that King is properly characterized as a proponent of affirmative action policies, or that the 1960s civil rights movement is necessarily conceived as favoring such policies. But it is at best historical to suggest that King opposed such policies, or that his statements suggest a principle of colorblindness whatever its purposes and effects.

B. Opposition to Categorical Thinking

Many people in the academy now challenge "categories," or "categorical thinking," or "binary oppositions,"⁶¹ and it seems plausible to suggest that these challenges are perceived, in many quarters, as an outgrowth of the civil rights movement of the 1960s. Generally, it is said that "categorical thinking" is a problem and that it is important to move beyond "binary oppositions" of various sorts. More particularly, it is said that the opposition between black and white treats as opposed two categories that are interdependent and mutually overlapping. The same, it is said, is true for gender. The division of human beings into "two kinds," male and female, is said to be a binary opposition that is oppressive because it is too simple.⁶² The general and the

59. A similar point is made in STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO* 60-79 (1994).

60. THE WISDOM OF MARTIN LUTHER KING, JR., *supra* note 15, at 68.

61. See, e.g., ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Dennis Peterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); Susan Sage Heinzelman, *Hard Cases, Easy Cases and Weird Cases: Canon Formation in Law and Literature*, MOSAIC, Spring 1988, at 59, 63. MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990), appears influenced by work of this sort.

62. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1989).

particular claims are united through the view that insisting on sharp categorical differences is perniciously hierarchical.⁶³

In the context of both race and sex, the challenge to sharp categorical differences is based on something true and important. People are not simply black or white; as a matter of genetic fact, they have complex and mixed racial and ethnic ancestries. Consider the fact that the plaintiff in *Plessy v. Ferguson*⁶⁴—Plessy himself—was only one-sixteenth black. There is a separate point. Race becomes an important social category only because of what society deems important. For young children, racial differences do not “code”—do not have the same meaning—in the way they do for adults in America. At least some of the same points might be made for gender, though the issue here is more contentious. Certainly no one could deny that there are men and women, or that there are important differences between men and women, many of them biological. But gender makes the social difference that it does in part because of social and legal practices.⁶⁵

But we may grant all this without accepting the view that binary oppositions or categories are themselves problematic. In fact thought itself proceeds through categories. We cannot make distinctions—between justice and injustice, equality and inequality—without categories or binary oppositions. We cannot distinguish between categorical thinking and its opposite (whatever that may be) without reference to categories. The problem with the challenge to categories and binary oppositions is that the challenge loses sight of the moral and political foundations of the attack on racial inequality. In fact it loses sight of the civil rights movement’s point. To challenge categorical thinking is to abandon the moral foundations of the movement, which was not an attack on categories as such, but on particular categories that were pernicious for particular reasons. There is no reason to suppose that categories are themselves the problem, or that we could or should proceed without them. Thought itself depends on categories. Indeed, a challenge to categorical thinking cannot really get off the ground.

Ideas of the sort I am challenging have not been irrelevant to law. Consider, for example, Roberto Unger’s attack on “contexts” and his advocacy of “context-smashing,” an attack that assumes that fixed contexts are themselves the problem.⁶⁶ It seems plausible to think that

63. See EISENSTEIN, *supra* note 61.

64. 163 U.S. 537 (1896).

65. Some adventurous people have challenged the division of human beings into “two kinds.” See BUTLER, *supra* note 62; THOMAS W. LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990).

66. See ROBERTO M. UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (PART I OF POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY)* (1987); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 109-11

the influence of Unger's work is connected to its apparent connection with the radical movements of the 1960s. But I think that the idea of "context-smashing" as such makes little sense. Some contexts are of course unjust, but this is not because of their status as contexts. It is because there is something substantively wrong with them. The civil rights movement was not challenging contexts, or fixity, as general independent evils. It was taking racial inequality as a particular evil.

C. *Implications for Law?*

It is far from clear that the civil rights movement should be taken to have implications for constitutional law. Perhaps social movements of this kind bear on politics but not on law. This is certainly a reasonable view. On the other hand, the civil rights movement, and Martin Luther King in particular, have been prominently used in constitutional argument. As we have seen, King's "I have a dream" speech has been used to give moral weight to the constitutional attack on affirmative action.⁶⁷ I think that most generally, the movement suggests a particular understanding of the issue of racial equality. It grows directly out of the attack on racial caste. I offer a few words on that understanding here. My goal is to offer a generalization, or a reading, of what participants in the civil rights movement of the 1960s were attacking.

The motivating idea behind an anticaste principle is that differences that are both highly visible and irrelevant from the moral point of view ought not without good reason be turned, by social and legal structures, into systematic social disadvantages. A systematic disadvantage is one that operates along standard and predictable lines in many important spheres of life, and that applies in realms that relate to basic participation as a citizen in a democracy. There is no algorithm by which to identify those realms. As a provisional working list, we might include education, freedom from private and public violence, income and wealth, employment, political representation, longevity, health, and political influence. (Recall the analogous list in the Port Huron Statement.) The anticaste principle suggests that with respect to basic human capabilities and functionings,⁶⁸ one group, defined in terms of a morally irrelevant characteristic, ought not to be systematically below another.

(1986). For more detailed criticism along the lines suggested here, see Cass R. Sunstein, *Routine and Revolution*, 81 NW. U. L. REV. 869 (1987).

67. See, e.g., Reynolds, *supra* note 58, at 1000-05.

68. See AMARTYA SEN, *INEQUALITY REEXAMINED* (1992); Martha C. Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 203 (R. Bruce Douglass et al. eds., 1990).

In the areas of race discrimination, a large part of the problem is this sort of systemic disadvantage. A social or biological difference has the effect of systematically subordinating members of the relevant group—not because of “nature,” but because of social and legal practices. It does so in multiple spheres and along multiple indices of social welfare: poverty, education, political power, employment, susceptibility to violence and crime, and so forth. By pointing to these variables, it should be clear that I am not stressing economic variables alone, though these are indeed important. I am instead suggesting reference to a broad and eclectic set of social indicators.

Consider in this regard—and also by way of comparison to the similar effort in the Port Huron Statement—the Human Development Index in the United Nations Development Program’s 1993 Human Development Report.⁶⁹ The index, based on longevity, educational attainment, and per capita income, is itself somewhat crude.⁷⁰ But it is highly revealing that the United States as a whole ranks sixth; that white Americans by themselves would rank first; and that blacks by themselves would rank thirty-first (next to Trinidad and Tobago).⁷¹

As Martin Luther King and Malcolm X both emphasized, systematic differences of this kind help produce frequent injuries to self-respect—the time-honored constitutional notion of “stigma.” A particular concern is that self-respect and its social bases ought not be distributed along the lines of race.⁷² When someone is a member of a group that is systematically below others, and when the group characteristic is highly visible, insults to self-respect are likely to occur nearly every day. An important aspect of a system of caste is that social practices produce a range of obstacles to the development of self-respect, largely because of the presence of the highly visible but morally irrelevant characteristic that gives rise to caste-like status.

Of course the law cannot provide self-respect, at least not in any simple or direct way. But group membership tends to fuel a cycle of discrimination,⁷³ in which, for example, employers rely on statistical discrimination; group members adjust their aspirations to this reliance; statistical discrimination becomes all the more rational; and so on. That is an aspect of the caste system to which the legal system is attempting to respond. It can operate largely because the high visibility of the group-based characteristic. If the characteristic were not

69. UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1993, at 9-20.

70. *Id.* at 10-18; see Cass R. Sunstein, *Well-Being and the State*, 107 HARV. L. REV. 1303, 1322 n.72 (1994).

71. UNITED NATIONS DEVELOPMENT PROGRAM, *supra* note 69, at 11, 18 & figs. 1.12-1.13.

72. Self-respect is emphasized in JOHN RAWLS, *A THEORY OF JUSTICE* 440-46 (1971), and JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

73. For more detail, see Sunstein, *The Anticaste Principle*, *supra* note 30.

visible, the same pattern could not occur.⁷⁴ And because the stigmatizing characteristic is highly visible, it will probably trigger reactions from others in a wide variety of spheres, even in the interstices of everyday life.⁷⁵ Highly visible characteristics are especially likely to be a basis for statistical discrimination and to fuel prejudice from third parties. Consider stereotypes about the physical characteristics of members of religious minorities, and compare this description of attitudes in prerevolutionary America:

So distinctive and so separated was the aristocracy from ordinary folk that many still thought the two groups represented two orders of being. . . . Ordinary people were thought to be different physically, and because of varying diets and living conditions, no doubt in many cases they were different. People often assumed that a handsome child, though apparently a commoner, had to be some gentleman's bastard offspring.⁷⁶

In the area of race, daily denials of basic respect, usually based on prejudice of some sort, are a large part of what it means to have a caste system. With blacks, for example, dark skin color is associated with a range of stereotypes that can have harmful effects during encounters with shopkeepers, employers, police officers, businesses, co-workers, and much more. These encounters rank among the injuries that the civil rights movement of the 1960s was attempting to eliminate. I suggest that an anticaste principle is a reasonable "reading" of its animating spirit.

It is important as well to note that any such principle is most plausibly used by legislative and executive bodies, and that the focus of the civil rights movement was on those bodies as well. Courts should play a secondary role. They lack the power of initiative, the fact-finding capacity, and the democratic legitimacy to bring about systematic social change on their own.⁷⁷ On this count participants in the 1960s movement were very much on the right track. Their substantive goals were well-connected with this institutional choice, and with their lack of emphasis on the judiciary as the foundation for social reform.

III. DEHUMANIZATION

I must now venture into somewhat more difficult and speculative territory. It has to do with issues of character, and with the way that

74. Compare the problems of discrimination against homosexuals, a problem that raises different issues because homosexuality is not readily visible.

75. See Jane Mansbridge, Presentation at the Conference on Equal Protection and Its Critics at Brown University (Mar. 11, 1994).

76. WOOD, *supra* note 31, at 27.

77. See generally ROSENBERG, *supra* note 6.

we characterize and interact with people with whom we disagree, or even people that we consider fundamentally different, or oppressors.

Begin with the opening quotation from Tom Hayden, which reveals a part of the picture. Hayden writes that it is time to "reassert the personal." Often it is said, and revealingly so, that the "personal is the political."⁷⁸ This slogan means that personal issues, especially in the area of sex equality, can be a product of political issues. Individual insults and injuries may connect with the distribution of political power; individual insults and injuries may cause the harm they do only because of the distribution of political power (consider the issue of sexual harassment). But the converse is also and equally true; the political may be the personal, in the sense that one's claims about politics are often a product of one's personal issues as well. We need not speculate about psychological forces in order to recognize this point. The second quotation from Hayden, writing in 1988, makes things very clear. On Hayden's retrospective view, personal desires of a certain kind ("defining not only yourself, but also your life by risking your life") were dominant, and civil rights claims were in a sense quite secondary. To put things a bit crudely, an important aspect of the 1960s movement, especially among white student activists, consisted of the playing out of personal issues in political guise. (This does not of course disparage the political claims, which stand or fall independently of their origins.⁷⁹)

There is a deeper point. In many radical movements, those who seek social change sometimes portray themselves as more than human, while they portray their enemies as less than human, or as fundamentally other than human. Or they *define* both themselves and their opponents just in terms of what separates them, so that there are no other common links. Often, of course, this is a strategy of those seeking to promote or maintain racial inequality; consider the rhetoric of the Nazi Party, or of the Ku Klux Klan. But the same strategy is often used by people who are seeking to overcome discrimination and oppression.⁸⁰ Hence there was a tendency in the 1960s civil rights movement to dehumanize certain groups of people—to refuse to see them as human beings, or as individuals with narratives, sufferings, and life histories of their own.

78. See, e.g., SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 314 (7th printing 1992) (citing ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA* 16-18 (1989)).

79. For a related discussion, see MARTHA C. NUSSBAUM, *Perception and Revolution: The Princess Casamassima and the Political Imagination*, in *LOVE'S KNOWLEDGE* 195 (1990).

80. Of course there is a huge difference between dehumanization by oppressors and dehumanization by oppressed people. The first involves an unjust goal, the second (by hypothesis) does not. But along the dimension I am discussing, the two phenomena are the same.

We can see an example in Malcolm X's frequent description of his oppressors as the "white man"—as if there were only one. Recall the quotation at the beginning of this essay: "We're all black to the white man." In fact Malcolm X used singular and plural forms throughout his writing and speaking for rhetorical effect. Compare his statement also quoted at the beginning of this essay: "[W]e're a thousand and one different colors. Turn around, *look* at each other!" This "looking" at particularity works, ironically, to establish common ground. We can see something similar in Malcolm X's reaction to the assassination of President Kennedy, to the effect that the "chickens [have] com[e] home to roost."⁸¹ The oddity of the reaction comes from the fact that Kennedy's own personal history—his own life, his family, his own role in promoting or undermining racial equality—was treated as quite beside the point.

Martin Luther King insistently avoided this form of dehumanization. Instead he attempted at all times to combat it. In doing so he raised two different points: the effects of this distinctive form of hatred on those who hate, and the erasure of particularity and individuality that is brought about by group-based hatred. Thus King wrote,

I have also decided to stick to love. . . . I'm not talking about emotional bosh when I talk about love, I'm talking about a strong, demanding love. And I have seen too much hate. I've seen too much hate on the faces of sheriffs in the South. I've seen hate on the faces of too many Klansman and too many White Citizens Councilors in the South to want to hate myself, because every time I see it, I know that it does something to their faces and their personalities and I say to myself that hate is too great a burden to bear. I have decided to love.⁸²

Thus King wrote, "Hate is just as injurious to the person who hates. Like an unchecked cancer, hate corrodes the personality and eats away its vital unity."⁸³

But most of King's response was connected with the need for particularity—with the need for humility, and for seeing each person as an individual. In his view, this understanding was interestingly connected with a commitment to universality. Rejecting sharp polarities between good people and bad people, he said, "[T]here is some good in the worst of us and some evil in the best of us. When we discover this, we are less prone to hate our enemies." Thus he wrote, "The one thing about bitterness is its blindness. Bitterness has not the capacity

81. See AUTOBIOGRAPHY, *supra* note 1, at 301.

82. TESTAMENT OF HOPE, *supra* note 4, at 250.

83. *Id.* at 102. To this Malcolm X responded: "I do not agree with Martin Luther King that one should love a racist whether he is lynching you or whatever he is doing. I believe in fighting a racist physically." MALCOLM X, *supra* note 56, at 66-67.

to make the distinction between some and *all*.”⁸⁴ And the Port Huron Statement reflected a similar view: “In social change or interchange, we find violence to be abhorrent because it requires generally the transformation of the target, be it a human being or a community of people, into a depersonalized object of hate.”⁸⁵ The key term here is “depersonalized object,” something that is also accomplished through the rhetorical ploy of using a singular to describe a group (“the white man,” “the Jew,” “the liberal,” and so forth).

In his famous statement after his trip to Mecca, Malcolm X spoke in terms that assert both particularity and universality, in a way that connected with some of King’s own writing. Thus Malcolm X said:

During the past eleven days here in the Muslim world, I have eaten from the same plate, drunk from the same glass, and slept in the same bed (or on the same rug) with fellow Muslims . . . whose eyes were the bluest of blue, whose hair was the blondest of blond, and whose skin was the whitest of white. And in the *words* and in the *actions* and in the *deeds* of the “white” Muslims, I felt the same sincerity that I felt among the black African Muslims of Nigeria, Sudan, and Ghana.

We were all truly the same⁸⁶

On this score it will be useful to close with the final discussion in a very popular book on the 1960s, *Destructive Generation*.⁸⁷ The authors are Peter Collier and David Horowitz, former editors of a left-wing magazine, *Ramparts*, turned Reagan Republicans. The book ends with an anecdote. The authors sought out Susan Sontag, who had recently delivered an influential speech whose theme is captured in its title: “Communism Is Fascism with a Human Face.” Collier and Horowitz, staunch anti-Communists, praised Sontag for that speech, but “[w]arning to the occasion,” pressed her for having republished without critical comment a 1969 essay about Communist North Vietnam, in which Sontag appeared to praise communism. Collier and Horowitz asked Sontag why she had not offered “further challenges to the adversary culture’s conventional wisdom about America and democracy.” (Note the terms “adversary culture” and “conventional wisdom.”) Collier and Horowitz added that Europe had produced Hitler, and that it was America that had rescued Europe “from the barbarisms of the East.”

84. THE WISDOM OF MARTIN LUTHER KING, JR., *supra* note 15, at 26.

85. MILLER, *supra* note 2, at 333.

86. AUTOBIOGRAPHY, *supra* note 1, at 340.

87. PETER COLLIER & DAVID HOROWITZ, *DESTRUCTIVE GENERATION: SECOND THOUGHTS ABOUT THE SIXTIES* 337-38 (1989).

Sontag responded, "I'm not really interested in having this discussion. You're just projecting your own Manichaean politics onto the world. I don't want to enter your world, where you push everything to extremes." The book ends with a suggestion that Sontag "was right—we did push things to extremes." But according to the authors, her "judgment on us was also a judgment on her and others who understood the political stakes but didn't push things far enough."

What may be especially interesting is that in their incarnation as 1980s Reagan Republicans, Collier and Horowitz showed the same character and sensibility as they showed in their incarnation as 1960s student radicals. This is a character and a sensibility that is attracted not only to sharp and simple distinctions between good people and evil people, and not only to an unduly clear sense of precisely which people stand with us and which stand against us, but also and precisely for the same reason to a form of dehumanization. The seeds of violence can usually be found here.

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Some people think that America has had one or perhaps two constitutional "moments"; others think that the New Deal qualifies as a third such moment, or even that America has had a large number of constitutional moments. In my view, any such picture is somewhat artificial—useful for heuristic purposes, but much too simple for reality. Our constitutional development has been jagged and somewhat unruly. It has many of the characteristics of a common-law process, punctuated by periods of public upheaval, in which the common-law process becomes less cautious and incremental than it usually is. The civil rights movement of the 1960s was one such period of public punctuation, and its principal actors were, in that sense, constitution-makers. The meaning of the civil rights movement has yet to be settled. But it is hardly adventurous to say that the period has had a significant and continuing influence on our understanding of the American political order, and that debates over its meaning and significance will help determine the meaning of that political order in the future. I have suggested that an insistence on the deviation between ideal and reality, or freedom from desperate conditions, opposition to caste, and caution about the judiciary were defining features of the civil rights movement. It should not be too much to suggest that those commitments ought to play a large role in similar movements in the future.